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28 3 - OPINION AND ORDER

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16 AIKEN, Judge:

17 Plaintiffs move for a preliminary injunction against defendant
18 United States of America, Department of Interior, enjoining the
19 Bureau of Reclamation ("Reclamation") from implementing the Klamath
20 Reclamation Project 2001 Annual Operations Plan ("2001 Plan" or
21 "Plan"). Under the 2001 Plan, water elevations of Upper Klamath Lake
22 and water flows below Iron Gate Dam will be maintained to support
23 endangered sucker fish and threatened coho salmon. Due to inadequate
24 water supplies, no irrigation water deliveries will be made to the
25 majority of land within the Klamath Reclamation Project ("Project").
26 Plaintiffs seek an order enjoining Reclamation from implementing the
27 Plan and ordering Reclamation to release unspecified "historic"
28 amounts of irrigation water. In the alternative, plaintiffs request
that the court order Reclamation to release 262,000 acre feet of
water, resulting in an Upper Klamath Lake elevation of 4138 at the
end of September, which allocates roughly fifty percent of stored

1 water and inflow to Project irrigators.

2 Plaintiffs claim that the 2001 Plan breaches their contractual
3 rights to irrigation water and is arbitrary and capricious under the
4 Administrative Procedure Act ("APA"), 5 U.S.C. § 706, in that its
5 implementation violates the National Environmental Policy Act
6 ("NEPA"), 42 U.S.C. § 4321, et seq., and the Endangered Species Act
7 ("ESA"), 16 U.S.C. § 1531, et seq.

8 BACKGROUND

9 The Project is a water storage and irrigation project serving
10 over 200,000 acres of land in Southern Oregon and Northern
11 California. The Project was authorized in 1905 pursuant to the
12 Reclamation Act of 1902. 32 Stat. 388, 43 U.S.C. § 371, et seq. In
13 accordance with state water law and the Reclamation Act, the United
14 States "appropriated all available water rights in the Klamath River
15 and Lost River and their tributaries in Oregon and began constructing
16 a series of water diversion projects." Klamath Water Users
17 Association v. Patterson, 204 F.3d 1206, 1209 (9th Cir. 2000)
18 ("Patterson").

19 Water for the Project is stored primarily in Upper Klamath Lake
20 ("UKL") on the Klamath River. The Link River Dam, constructed near
21 the mouth of UKL, regulates flows in the lower Klamath River. It is
22 owned by Reclamation, but operated and maintained pursuant to
23 contract by PacifiCorp, a power company. PacifiCorp also owns and
24 operates the canals that carry water from UKL to the Link River, and
25 it operates several hydroelectric and re-regulating dams on the
26 Klamath River pursuant to a license issued by the Federal Energy
27 Regulatory Commission. The furthest downstream of these dams is the

1 Iron Gate Dam in California.

2 Reclamation must balance diverse, and often competing, demands
3 for Project water. Reclamation must deliver water to Project
4 irrigators in accordance with the rights held by the United States
5 and the irrigators' individual repayment contracts, subject to the
6 availability of water. Plaintiffs Klamath Irrigation District and
7 Tulelake Irrigation District have rights to receive appropriated
8 water pursuant to their contracts with Reclamation. Two national
9 wildlife refuges, the Lower Klamath and Tule Lake National Wildlife
10 Refuges, depend on the Project for water and receive large quantities
11 of return irrigation flows and other Project waters.

12 Under the ESA, Reclamation must not engage in any action that is
13 likely to jeopardize the continued existence of an endangered or
14 threatened species or result in the destruction or adverse
15 modification of the critical habitat of such a species. See 16
16 U.S.C. § 1536(a)(2). In 1988, two fish, the Lost River and shortnose
17 suckers, were listed as "endangered" due to a decline in the species'
18 population resulting from a fragmentation of aquatic habitat through
19 damming, flow diversion, and decreased water quality. 53 Fed. Reg.
20 27130, 27131-32 (July 18, 1988). The suckers live only in UKL and
21 nearby Project waters. They are adfluvial, in that the suckers live
22 mostly in UKL, migrating up tributaries to spawn.

23 Below Iron Gate Dam, the Klamath River is used by various species
24 of fish, including the Southern Oregon/Northern California Coast coho
25 salmon ("coho salmon" or "salmon"). The coho salmon was listed as
26 "threatened" under the ESA in 1997, in part due to habitat
27 degradation resulting from water diversions. 62 Fed. Reg. 24588,

1 24592 (May 6, 1997). The Klamath River from Iron Gate Dam to the
2 Pacific Ocean has been designated as a "critical habitat" for the
3 coho salmon. See 64 Fed. Reg. 24049 (May 5, 1999). The coho are
4 anadromous, in that they migrate from the ocean to fresh water to
5 spawn.

6 Large numbers of bald eagles migrate into the Klamath Basin
7 during fall and winter. The eagles, listed as "threatened" under the
8 ESA, rely heavily on the abundant waterfowl that use the Lower
9 Klamath National Wildlife Refuge, which receives water from Project
10 operations.

11 Finally, Reclamation must also consider the rights of Indian
12 tribes, including defendants-intervenors Klamath and Yurok Tribes,
13 who hold fishing and water treaty rights in the Klamath River Basin.
14 The Tribes retained these rights pursuant to treaties in which they
15 ceded millions of acres of land to the United States. See Parravano
16 v. Babbitt, 70 F.3d 539, 541-42, 545 (9th Cir. 1995); United States v.
17 Adair, 723 F.2d 1394, 1414 (9th Cir. 1983). The endangered suckers,
18 called "c'wam" by the Klamath Tribes, play an integral role in the
19 Klamath Tribes' customs and traditions. Prior to its closing in
20 1986, Klamath Tribes maintained a c'wam fishery which provided a
21 source of food and income for tribal members. Declaration of Elwood
22 Miller, ¶¶ 5-9. The threatened coho salmon are equally important to
23 the Yurok Tribe, providing a source of food, opportunities for
24 employment and income, and the basis of Yurok customs and traditions.
25 Declaration of Glenn Moore, ¶¶ 4, 6, 8, 11. Reclamation has an
26 obligation to protect tribal trust resources such as the sucker fish
27 and salmon. Patterson, 204 F.3d at 1213; Parravano, 70 F.3d at 547;

1 Adair, 723 F.2d at 1408-11, 1415.

2 Several constraints force Reclamation "to walk a water-management
3 tightrope in dry years." Defendants' Opposition to Motion for
4 Preliminary Injunction, p. 6. Unlike other Reclamation projects, the
5 Project does not have a major water storage reservoir. Yearly water
6 levels of UKL vary, largely depending on the previous winter's
7 snowfall and the amount of precipitation during the spring and
8 summer. UKL is relatively shallow and unable to capture and store
9 large quantities of water from spring run-off. Consequently, the
10 Project's storage capacity is limited, and Reclamation cannot store
11 water during years of heavy precipitation to meet water needs in dry
12 years.

13 To prepare Project operation plans, Reclamation relies on the
14 Natural Resources Conservation Service ("NRCS") Streamflow Forecast
15 for the Upper Klamath Basin. NRCS issues its forecasts on a monthly
16 basis, between January and June, for the period from April 1 to
17 September 30. The Project's primary irrigation season begins in late
18 March, shortly after Reclamation receives the first streamflow
19 forecasts.

20 In light of the diverse water demands, Reclamation initiated a
21 public process to establish a new long-term operating plan. For the
22 past several years, Reclamation has issued one-year interim plans
23 while formulating a long-term plan for water distribution.
24 Reclamation issues the annual plans in order to provide operating
25 criteria and to assist water users and resource managers in planning
26 for the water year. Although anticipated several years ago, a long-
27 term plan has not been completed.

1 Based on NRCS forecasts, Reclamation has defined the 2001 water
2 year as "critical dry." As of April 6, 2001, Reclamation determined
3 that inflow volume into UKL would be 108,000 acre feet during the
4 period of April through September, the smallest amount of inflow on
5 record.

6 On January 22, 2001, Reclamation forwarded a biological
7 assessment of the Project's effects on the coho salmon to the
8 National Marine Fisheries Service ("NMFS") and requested the
9 initiation of formal consultation under the ESA. Similarly, on
10 February 13, 2001, Reclamation forwarded a biological assessment of
11 the Project's effects on the shortnose and Lost River suckers to the
12 United States Fish and Wildlife Service ("FWS") and requested formal
13 consultation. Reclamation's biological assessments concluded that
14 the Project's continuing operations were likely to adversely affect
15 the sucker species and the coho salmon.

16 FWS began formal consultation and issued a draft Biological
17 Opinion ("BiOp") on March 13, 2001. The draft BiOp concluded that
18 the sucker populations in UKL are at risk from adverse water quality,
19 loss of habitat, entrainment, and lack of passage. The BiOp stated
20 that development and operations of the Project were major factors
21 contributing to the loss and degradation of aquatic habitat and the
22 endangered status of the suckers. In accordance with the ESA and
23 governing regulations, FWS proposed "reasonable and prudent
24 alternatives" ("RPAs") to the proposed operation of the Project that
25 would not cause jeopardy. 16 U.S.C. § 1536(b)(3)(A). FWS proposed
26 an RPA of minimum UKL surface elevations between 4140 and 4142.5 feet
27

1 from January through October 15.¹

2 NMFS completed a draft BiOp on March 19, 2001. The draft BiOp
3 concluded that the Project's operations would jeopardize coho salmon
4 and proposed RPAs of minimum water flows in Klamath River below Iron
5 Gate Dam.

6 Upon review of the draft BiOps, Reclamation informed FWS and NMFS
7 that the forecasted water supplies for 2001 were not adequate to meet
8 the needs of both RPAs. On April 6, 2001, FWS and NMFS released
9 their final BiOps on the effects of the Project on the suckers, coho
10 salmon, and bald eagles. FWS Administrative Record ("FWS AR"),
11 Addendum 2; NMFS Administrative Record ("NMFS AR"), Volume III, 105.
12 FWS and NMFS again concluded that operation of the Project, as
13 initially proposed by Reclamation, would jeopardize the continued
14 existence of the suckers and the coho salmon. The FWS BiOp concluded
15 that the Project's operations would cause harm, but not jeopardy, to
16 the continued existence of the bald eagles.

17 FWS and NMFS adjusted the minimum UKL elevations and Klamath
18 River flows to reflect the reduced water available for the 2001 water
19 year. FWS proposed a minimum UKL elevation of 4139, provided a
20 minimum surface level of 4140 was sustained on a long-term basis.
21 The minimum elevation RPA is intended to increase water quality and
22 the physical habitat for juvenile and adult suckers, and provide for
23 access to spawning areas.

25 ¹A FWS BiOp prepared in 1992 recommended lower lake elevations
26 in UKL. Relying on new information regarding potential adverse
27 effects of low lake levels and massive fish kills in the 1990s, FWS
concluded that higher UKL levels than those recommended in the 1992
BiOp were necessary to reduce the risk of extinction.

1 NMFS proposed a range of minimum instream flows in the Klamath
2 River below Iron Gate Dam from April through September, from a low of
3 1,000 cubic feet per second ("cfs") in July through September, to a
4 high of 2,100 cfs between June 1-15. The river flows are recommended
5 in order to increase riparian habitat for coho salmon. The RPAs in
6 the NMFS BiOp are limited in duration, because NMFS expects
7 additional information regarding flow and salmon habitat will become
8 available in the near future. NMFS represents that it will prepare
9 a comprehensive BiOp by June 7, 2001, addressing minimum water flows
10 below Iron Gate Dam in future critical dry years.

11 Also on April 6, 2001, Reclamation issued its 2001 Operations
12 Plan, which incorporates the conclusions contained in the BiOps and
13 implements the RPAs proposed by FWS and NMFS. After implementation
14 of the RPAs, the availability of irrigation water is severely
15 limited, and most Project lands will receive no water deliveries.
16 The Plan makes available for irrigation 70,000 acre feet of water
17 from Clear Lake and Gerber Reservoirs.²

18 Plaintiffs filed this action on April 9, 2001, and moved for
19 preliminary injunctive relief on April 11. The court held a status
20 conference on April 12, 2001, and ordered the defendants (hereinafter
21 "the government") and proposed defendants-intervenors to respond by
22 April 24, 2001, and plaintiffs to reply by April 26, 2001. The
23 government filed the administrative record on April 18, 2001, with an

24
25 ²Defendant intervenor The Wilderness Society suggests that
26 this allocation of irrigation water violates the ESA because no
27 water is allocated to the Lower Klamath National Wildlife Refuge,
which could result in the incidental take of numerous bald eagles.
See The Wilderness Society's Opposition to Plaintiffs' Motion for
Preliminary Injunction, pp. 28-29.

1 Addenda filed April 25 (docs. #46 and #85).

2 Much litigation over the Project and its operations has ensued
3 in recent years, including a case particularly relevant to
4 plaintiffs' motion for preliminary injunction. In May 2000, various
5 conservation and fishing interests, including several defendants-
6 intervenors in this case, filed a lawsuit challenging Reclamation's
7 2000 Plan. Pacific Coast Federation of Fishermen's Ass'n v. Bureau
8 of Reclamation, ___ F. Supp.2d ___, 2001 WL 360146 (N.D. Cal. April
9 3, 2001). The plaintiffs there alleged that Reclamation violated
10 ESA, by releasing water for irrigation and water flows in the Klamath
11 River prior to consultation with NMFS regarding the Project's effects
12 on threatened coho salmon. The District Court for the Northern
13 District of California agreed and issued an injunction prohibiting
14 Reclamation from releasing any water for irrigation until Reclamation
15 complied with its ESA obligations.

16 Specifically, the court ordered: "[T]he Bureau of Reclamation
17 hereby is enjoined from sending irrigation deliveries from Klamath
18 Project whenever Klamath River flows at Iron Gate Dam drop below the
19 minimum flows recommended in the Hardy Phase I report, until such
20 time as the Bureau completes a concrete plan to guide operations in
21 the new water year, and consultation concerning that plan is
22 completed, either by (1) formal consultation to a "no jeopardy"
23 finding by the NMFS, or (2) the Bureau's final determination, with
24 the written concurrence of the NMFS, that the proposed plan is
25 unlikely to adversely affect the threatened coho salmon." 2001 WL
26 360146, *21.

27 On April 16, 2001, the court clarified its April 3 Order in

1 response to a "Notice of Completion of Consultation" filed by the
2 government. The court stated that to fulfill the requirements for
3 termination of the injunction, Reclamation must finalize a concrete
4 2001 Plan, formally consult with NMFS regarding that plan, and obtain
5 from NMFS a BiOp on the effects of the 2001 Plan. Conversely, if
6 NMFS finds that the 2001 Plan is not likely to jeopardize the
7 existence of coho salmon or adversely modify critical habitat, the
8 injunction may be lifted. If NMFS finds that the 2001 Plan does
9 cause jeopardy or adversely affect critical habitat, Reclamation must
10 notify NMFS whether it intends to proceed with the Plan, and if so,
11 whether it will adopt any RPAs proposed by NMFS. If Reclamation
12 intends to proceed despite a jeopardy finding and absent the RPAs
13 proposed by NMFS, it must state the basis for its conclusion that
14 such action does not violate the ESA. Pacific Coast Federation of
15 Fishermen's Ass'n v. Bureau of Reclamation, Civ. No. 00-01955-SBA
16 (N.D. Cal. April 16, 2001).³

17 On April 23, 2001, all parties to the litigation at bar
18 participated for three full days in mediation proceedings directed by
19 Magistrate Judge Thomas Coffin. Despite intense and genuine efforts
20 by Judge Coffin and the parties, no resolution for the 2001 water
21 year could be agreed upon, although the parties expressed an interest
22 in continued long-term mediation with Judge Coffin. The court heard
23 oral argument on April 27, 2001.

25 ³Here, neither NMFS nor FWS issued a BiOp on the effects of
26 the final 2001 Plan; rather, the Plan and the BiOps were issued the
27 same day, with the Plan incorporating the RPAs contained in the
BiOps.

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The party seeking a preliminary injunction must show either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 839-40 (9th cir. 2001). While stated as alternatives, "[t]hese formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases." Big Country Foods v. Board of Educ, 868 F.2d 1085, 1088 (9th Cir. 1989). "Even if the balance of hardships tips sharply in plaintiffs' favor, it must be shown as an irreducible minimum that there is a fair chance of success on the merits." Stanley v. University of Southern California, 13 F.3d 1313, 1319 (1994). Additionally, where the public interest is involved, the court must consider whether the balance of public interests weighs in favor of granting or denying the injunctive relief sought. Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457, 459 (9th Cir. 1994).

DISCUSSION

A. Balance of Hardships

Plaintiffs contend that they are entitled to preliminary injunctive relief primarily because plaintiffs, and those they represent, will suffer great harm if the 2001 Plan is implemented. There is no question that farmers who rely on irrigation water and their communities will suffer severe economic hardship if the 2001 Plan is implemented. The declarations of Steven Kandra and David

1 Cacka, Klamath Basin farmers, describe the hardships they will suffer
2 if their lands receive no irrigation water, including loss of income,
3 inability to pay debts, potential loss of land and equipment, and
4 immeasurable harm to their way of living. Declaration of Steven
5 Kandra, ¶¶ 5-9; Declaration of David Cacka, ¶¶ 8-11. Local
6 governmental entities in the Klamath River Basin anticipate
7 agricultural losses in the millions of dollars, loss in revenues, and
8 additional burdens on social services. See, e.g., Declarations of
9 William J. Stephens, Gary W. Anderson, Sharron L. Molder, Mary
10 Frances McHugh. The court recognizes the harm that could be suffered
11 by plaintiffs and surrounding communities. However, the court must
12 balance that harm against the harm to the suckers and salmon, those
13 who rely on the fish, as well as the public interest.

14 NMFS and FWS have determined that Project operations will cause
15 jeopardy to the continuing existence of the suckers and coho salmon
16 and adversely affect the critical habitat of the coho salmon.
17 Threats to the continued existence of endangered and threatened
18 species constitute ultimate harm. "Congress has spoken in the
19 plainest of words, making it abundantly clear that the balance has
20 been struck in favor of affording endangered species the highest of
21 priorities, thereby adopting a policy which it described as
22 'institutionalized caution.'" Tennessee Valley Authority v. Hill,
23 437 U.S. 153, 194 (1978); accord Sierra Club v. Marsh, 816 F.2d 1376,
24 1383-84, 1387 (9th Cir. 1987).

25 The Klamath and Yurok Tribes rely on the fish as a vital
26 component of the Tribes' cultures, traditions, and economic vitality.
27 Members of the Klamath and Yurok Tribes, Elwood Miller and Glenn

1 Moore, describe the past and continuing hardship suffered by Tribal
2 members as a result of the decline of their fisheries. Declaration
3 of Elwood Miller, ¶¶ 5-11, 15, 16; Declaration of Glenn Moore, ¶¶ 6-
4 8, 11. Many customs and traditions revolve around the fish harvest,
5 which is now reduced, or in the case of the suckers, non-existent.
6 Loss of fish results in a loss of food, income, employment
7 opportunities, and sense of community.

8 Similarly, fishermen and fishing communities rely on coho salmon
9 to sustain economic viability and their way of life. The public
10 interest weighs heavily on both sides of the dispute.

11 Balancing these harms is a difficult task, and one that leads to
12 no concrete determination. Given the high priority the law places on
13 species threatened with extinction, I cannot find that the balance of
14 hardship tips sharply in plaintiffs' favor.

15 B. Breach of Contract Claim

16 Plaintiffs allege that Reclamation breached its contracts with
17 plaintiffs Klamath Irrigation District and Tulelake Irrigation
18 District by using Project water for purposes other than irrigation.
19 However, as recognized by this court and the Ninth Circuit,
20 plaintiffs' contract rights to irrigation water are subservient to
21 ESA and tribal trust requirements. Patterson, 204 F.3d at 1214.
22 Therefore, plaintiffs cannot assert breach of contract based on
23 Reclamation's allocation of water to protect the suckers and salmon.
24

25 Plaintiffs also allege breach of contract based on Reclamation's
26 failure to preserve and maintain the water supply for users entitled
27 to take or receive water under their contracts. Plaintiffs do not

1 explain what precise action Reclamation should take to protect its
2 water supply, although they suggest that Reclamation take legal
3 action against junior water users outside the Project.

4 Under federal reclamation law, the Secretary of the Interior is
5 required to proceed in conformity with state laws with respect to the
6 control, appropriation, use, or distribution of water used in
7 irrigation, provided such state laws are consistent with directives
8 of Congress. See California v. United States, 438 U.S. 645, 668-69
9 (1978).

10 Water rights adjudication for the Klamath River Basin to perfect
11 asserted water rights is pending in state court. See United States
12 v. Oregon, 44 F.3d 758, 762 (9th Cir. 1994). Apparently, numerous
13 parties have filed pre-1909 water right claims to the UKL and its
14 tributaries. See Klamath Tribes' Memorandum in Opposition to
15 Plaintiffs' Motion for Preliminary Injunction, p. 7. According to
16 the government, the State of Oregon has taken the position that it
17 will not deny existing water rights based on the claim of an alleged
18 senior water holder during the water rights adjudication. Therefore,
19 it appears that Reclamation is precluded from pursuing action against
20 junior water users until all rights have been adjudicated.
21 Regardless, plaintiffs present no specific information as to the
22 identity of junior water users or whether Reclamation could
23 successfully assert water rights claims against them.

24 Finally, plaintiffs fail to explain why Reclamation must deliver
25 irrigation water while legal action is contemplated, particularly in
26 light of Reclamation's obligation to protect ESA species and tribal
27 trust resources. Thus, plaintiffs fail to show a likelihood of

1 success on the merits of their contract claim.

2 C. Administrative Procedure Act Claims

3 Plaintiffs allege that the Reclamation violated NEPA by issuing
4 the 2001 Plan without preparing an Environmental Impact Statement,
5 and that FWS and NMFS violated the ESA by failing to utilize the
6 best scientific evidence available in their respective BiOps.
7 Neither NEPA nor the ESA provide a private cause of action for the
8 claims asserted by plaintiffs. See Bennett v. Spear, 520 U.S. 154,
9 172-73 (1997) (judicial review of biological opinions available under
10 the APA); Northwest Resource Information Center, Inc. v. National
11 Marine Fisheries Service, 56 F.3d 1060, 1066 (9th Cir. 1995) (NEPA
12 claim reviewable under APA). Therefore, judicial review of the
13 challenged agency actions is governed by § 706 of the APA. 5 U.S.C.
14 § 706(2); Pyramid Lake Paiute Tribe of Indians v. United States Dep't
15 of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990).

16 Under the APA, an agency decision must be upheld unless it is
17 "arbitrary, capricious, an abuse of discretion, or otherwise not in
18 accordance with law." 5 U.S.C. § 706(2)(A); see also, Marsh v. Oregon
19 Natural Resources Council, 490 U.S. 360, 376 (1989) (arbitrary and
20 capricious standard applies to agency findings which involve agency
21 expertise). Although the "inquiry into the facts is to be searching
22 and careful, the ultimate standard of review is a narrow one. The
23 court is not empowered to substitute its judgment for that of the
24 agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.
25 402, 416 (1971). "When specialists express conflicting views, an
26 agency must have discretion to rely on the reasonable opinions of its
27 own qualified experts even if, as an original matter, a court might

1 find contrary views more persuasive." Marsh, 490 U.S. at 378.

2 In other words, a court "may reverse the agency's decision as
3 arbitrary or capricious only if the agency relied on factors Congress
4 did not intend it to consider, entirely failed to consider an
5 important aspect of the problem, offered an explanation that ran
6 counter to the evidence before the agency, or offered one that is so
7 implausible that it could not be ascribed to a difference in view or
8 the product of agency expertise." Western Radio Service Co. v. Espy,
9 79 F.3d 896, 900 (9th Cir. 1996) (citing Dioxin/Organochlorine Center
10 v. Clarke, 57 F.3d 1517, 1521 (9th Cir. 1995)).

11 1. National Environmental Policy Act

12 NEPA requires all federal agencies to prepare a detailed
13 Environmental Impact Statement ("EIS") for "every recommendation or
14 report on proposals for legislation and other major Federal actions
15 significantly affecting the quality of the human environment." 42
16 U.S.C. § 4332(2)(C). Implementing regulations provide for the
17 preparation of an environmental assessment ("EA"), a brief
18 preliminary evaluation which either determines that an EIS is
19 required or concludes with a finding of no significant impact
20 ("FONSI"). 40 C.F.R. § 1508.9. Agencies may also choose to prepare
21 an EA as an aid to agency planning. Id. § 1501.3(b).

22 NEPA's purpose is to ensure informed agency action. Swanson v.
23 United States Forest Service, 87 F.3d 339, 343 (9th Cir. 1996). "NEPA
24 does not mandate particular substantive results, but instead imposes
25 only procedural requirements." Okanogan Highlands Alliance v.
26 Williams, 236 F.3d 468, 473 (9th Cir. 2000) (quoting Laguna Greenbelt,
27 Inc. v. United States Dep't of Transp., 42 F.3d 517, 523 (9th Cir.

1 1994)).

2 Although Reclamation did not prepare an EIS, it prepared an EA
3 for the 2001 Plan. The EA examined potential environmental effects
4 of proposed operations in 2001 under a critical dry forecast. The EA
5 took into account the RPAs proposed by FWS and NMFS, and the
6 operational effects on the Projects if the RPAs were implemented.
7 The EA also suggested five alternative operations for the Project and
8 addressed the impacts of each alternative. Reclamation's EA did not
9 conclude with a FONSI. In light of the extreme drought conditions
10 and the proposed RPAs, Reclamation found that the plan could
11 significantly affect the environment. However, the EA did not
12 specifically find that an EIS was required for the 2001 Plan.⁴

13
14 a. Standing

15 Defendants-intervenors representing conservation and fishing
16 interests (hereinafter "The Wilderness Society") argue that
17 plaintiffs lack standing to pursue their NEPA claim. The Wilderness
18 Society claims that plaintiffs' alleged harm is purely economic and
19 outside the zone of interests protected by NEPA. I disagree.

20 "NEPA's purpose is to protect the environment, not the economic
21 interests of those adversely affected by agency decisions." Nevada
22 Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 716
23 (9th Cir. 1993). Accordingly, "a plaintiff who asserts purely

24
25 ⁴In their Reply brief, plaintiffs contend that the government,
26 by issuing an EA, admits that the 2001 Plan triggered NEPA and that
27 they have failed to comply with NEPA requirements. I disagree.
The regulations clearly allow an agency to prepare an EA "on any
action at any time" to assist in planning. 40 C.F.R. § 1501.3(b).

1 economic injuries does not have standing to challenge an agency
2 action under NEPA." Id.; accord Western Radio Services, 79 F.3d at
3 902-03. Plaintiffs must assert more than economic harm or a
4 "lifestyle loss" to invoke standing; plaintiffs must also assert that
5 the 2001 Plan "will have a primary impact on the natural
6 environment." Id. at 903 (quoting Port of Astoria v. Hodel, 595 F.2d
7 467, 476 (9th Cir. 1979)); Nevada Land Action, 8 F.3d at 716.

8 Although plaintiffs emphasize their potential economic losses,
9 they also allege harm to the natural environment. Plaintiffs allege
10 that the 2001 Plan will impact air, water, and soil quality, as well
11 as waterfowl and wildlife which inhabit the wildlife refuges.
12 Complaint, ¶¶ 22, 39. Plaintiffs submit declarations in support of
13 their allegations.⁵ Accordingly, I find that plaintiffs' allegations
14 of economic harm are coupled with environmental concerns and suffice
15 to establish standing under NEPA.

16 b. Application to Ongoing Operations

17 Plaintiffs argue that the "changed" operating criteria of
18 prioritizing water for fish over irrigation purposes and the
19 implementation of the RPAs recommended by the BiOps render the Plan
20 a "major federal action" triggering the requirements of NEPA.⁶
21

22 ⁵Three declarants, however, do not appear to be parties to
23 this litigation. See Declarations of Larry Turner, Robert L.
24 Crawford, and Rick Woodley. Nevertheless, the court considers the
25 interests stated by those individuals to be similar to those which
26 could be asserted by actual plaintiffs or plaintiff-intervenors.

27 ⁶The court notes that plaintiffs do not challenge explicitly
28 the implementation of the RPAs in their Complaint; rather,
29 plaintiffs limit their NEPA challenge to Reclamation's
30 "determin[ation] that the Klamath Project will be operated for
31 purposes other than irrigation and refuge use." Plaintiffs'

1 Plaintiffs allege that Reclamation cannot implement the 2001 Plan
2 before it prepares an EIS describing the purpose and need for the
3 Plan, the environmental effects of the Plan, alternatives to the
4 Plan, and means by which the impacts of the Plan could be mitigated.
5 Plaintiffs argue that the failure to analyze alternative sources of
6 water hampered Reclamation's ability to meet its contractual
7 irrigation obligations and renders the 2001 Plan arbitrary and
8 capricious. The government responds that practical constraints
9 preclude the application of NEPA to annual operating plans such as
10 the 2001 Plan.

11 NEPA does not apply retroactively. See Westside Prop. Owners v.
12 Schlesinger, 597 F.2d 1214, 1223 (9th Cir. 1979). Therefore, an EIS
13 cannot be required on the basis of the Project's construction.
14 "However, if an ongoing project undergoes changes which themselves
15 amount to 'major Federal actions,' the operating agency must prepare
16 an EIS." Upper Snake River Chapter of Trout Unlimited v. Hodel, 921
17 F.3d 232, 234-35 (9th Cir. 1990) (citing Andrus v. Sierra Club, 442
18 U.S. 347, 363 n. 21 (1979)). Thus, the issue is whether the 2001
19 Plan constitutes a "major federal action" under NEPA.

20 As an initial matter, plaintiffs' characterization of
21 Reclamation's duty to protect ESA species and tribal resources as a
22

23 Complaint for Declaratory and Injunctive Relief, ¶ 38. However,
24 plaintiffs refer to the RPAs in their Complaint, and plaintiffs
25 raised challenges to the implementation of the RPAs in their briefs
26 and during oral argument. In fact, during oral argument,
27 plaintiffs conceded that Reclamation was bound by the ESA, but that
28 Reclamation's discretionary action of implementing the RPAs
requires an EIS. Nevertheless, plaintiffs rely heavily on their
"change in operations" argument in their briefs, and I will
therefore address it.

1 "change in operations" implemented in response to various "demands"
2 is inaccurate. See Plaintiffs' Memorandum in Support of Preliminary
3 Injunction, pp. 1-2, 11. Reclamation "has responsibilities under the
4 ESA as a federal agency. These responsibilities include taking
5 control of the [Project] when necessary to meet the requirements of
6 the ESA, requirements that override the water rights of the
7 Irrigators." Patterson, 204 F.3d at 1213.

8 Similarly, the United States, as a trustee for the Tribes, is
9 obligated to protect the Tribes' rights and resources. See Mitchell
10 v. United States, 463 U.S. 206, 224-26 (1982); Patterson, 204 F.3d at
11 1213. Water rights for the Klamath Basin Tribes "carry a priority
12 date of time immemorial." Adair, 723 F.2d at 1414. These rights
13 "take precedence over any alleged rights of the Irrigators."
14 Patterson, 204 F.3d at 1214. Reclamation, therefore, has a
15 responsibility to divert the water and resources needed to fulfill
16 the Tribes' rights.

17 As such, Reclamation's "change in operation" is mandated by law,
18 and the requirements of NEPA do not apply. National Wildlife
19 Federation v. Espy, 45 F.3d 1337, 1343 (9th Cir. 1995) (citing
20 Forelaws on Board v. Johnson, 743 F.2d 677, 681 (9th Cir. 1984)).

21 Whether an EIS is required for the Plan's implementation of the
22 recommended RPAs is a closer question. As plaintiffs maintain, the
23 consequences of the 2001 Plan are unprecedented and will undoubtedly
24 have an effect on the environment. The government concedes this
25 point. However, under these specific circumstances, I find that the
26 issue is "not whether the actions are of sufficient magnitude to
27 require the preparation of an EIS, but rather whether NEPA was

1 intended to apply at all to the continuing operations of completed
2 facilities." County of Trinity v. Andrus, 438 F. Supp. 1368, 1388
3 (E.D. Cal. 1977).

4 If NEPA applies to the 2001 Plan, Reclamation could not comply
5 with the mandates of NEPA and prepare an EIS before irrigation water
6 deliveries normally begin. An EIS takes at least several months to
7 complete. Reclamation relies on NRCS forecasts to estimate the
8 amount of available water and prepare an operations plan for the
9 year. Forecasts begin in January, some two months prior to the
10 commencement of irrigation season. These time constraints render it
11 impossible for Reclamation to complete an EIS for an annual operating
12 plan.

13 In Trinity, the plaintiffs sought to enjoin Reclamation from
14 lowering the level of a reservoir during a drought year because of
15 the potential damage to fish populations. The district court
16 rejected the plaintiffs' NEPA claims, finding that the proposed
17 action was nothing more than the continued operation of the facility.
18 Id. Additionally, the court explained:

19 If . . . an EIS were to be required to cover continuing
20 operations over a timespan short enough to allow realistic
21 adjustments of operations to meet changed conditions, the
22 Bureau and most other federal agencies would be condemned
to an endless round of paperwork. . . . Thus, for projects
. . . which have an annual planning cycle, an EIS would
virtually always be in progress.

23 Trinity, 438 F. Supp. at 1389. The court concluded that if NEPA
24 required such an "operational" EIS, "the resulting interference with
25 the intended functions of federal agencies could be so great as to
26 render compliance 'impossible' within the meaning" of NEPA. Id. I
27 agree. It makes no sense to impose upon Reclamation a requirement it

1 can never fulfill.

2 Plaintiffs rely on a decision from the Eastern District of
3 California, where the district court held that the implementation of
4 statutorily-mandated water allocations required an EIS. Westlands
5 Water District v. United States, 850 F. Supp. 1388 (E.D. Cal. 1994).
6 There, however, the alleged federal action involved implementation of
7 a newly-legislated statutory scheme which reduced the amount of water
8 available to irrigators by fifty percent. Id. at 1416. Westlands
9 did not involve the implementation of a short-term annual water plan
10 prepared under drought conditions.

11 Finally, even if plaintiffs could show a likelihood of success
12 on the merits of their NEPA claim, they would not be entitled to an
13 injunction. The APA authorizes the court to "set aside, rather than
14 compel," agency actions. 5 U.S.C. § 706(2). Accordingly, the
15 appropriate remedy would be to set aside the 2001 Plan and require
16 Reclamation to prepare an EIS. Plaintiffs argue that, while the EIS
17 is pending, the court should order historic amounts of water
18 deliveries. Plaintiffs claim that no evidence shows that historic
19 irrigation deliveries in prior dry years caused greater harm to the
20 suckers or the salmon than in any other year. Plaintiffs fail to
21 recognize that Project operations remain subject to the requirements
22 of the ESA and Reclamation's tribal trust obligations, which would
23 preclude the delivery of any irrigation water if the 2001 Plan is set
24 aside.⁷ See 40 C.F.R. § 1506.1(c). Moreover, absent a concrete and
25

26 ⁷The court is not convinced that prior years with low UKL
27 elevations and Klamath River flow did not harm the fish and would
28 not harm the fish under the unprecedented conditions of this water

1 final 2001 Plan, the injunction issued by the Northern District of
2 California would remain in full force and effect. Therefore,
3 plaintiffs cannot obtain the injunctive relief they seek under NEPA.

4 I am disturbed, however, that Reclamation has failed to complete
5 an EIS analyzing the effects and proposed alternatives of a long-term
6 plan. Reclamation represented in past proceedings that such a plan
7 would be completed long before 2001. Yet, no plan exists. In
8 essence, Reclamation is avoiding its duties under NEPA by relying on
9 annual plans to which NEPA cannot realistically apply. During oral
10 argument, government counsel represented that the long-term EIS is
11 scheduled to be completed in February 2002. However, it awaits the
12 completion of an updated NMFS BiOp, slated to be completed in June
13 2001. The court intends to monitor Reclamation's compliance with its
14 representations. This dispute highlights the need for long-term
15 planning to minimize the effects of future dry years.

16 b. ESA Claims

17 Plaintiffs allege that Reclamation's implementation of the FWS
18 and NMFS BiOps violates the ESA, because: 1) the RPAs outlined in
19 the BiOps are not consistent with the intended purpose of the
20 Project; 2) NMFS improperly determined that the ESA compels agency
21 actions; 3) FWS and NMFS failed to develop an environmental baseline
22 to determine the actual effects of the Project; 4) FWS failed to
23 consider scientific evidence of variable lake elevations and the

24 _____
25 year. Coho salmon were not listed until 1997, and the suckers
26 remain endangered more than twelve years after they were listed.
27 As the government noted in argument, lowering UKL even one foot
28 lower than the minimum RPA of 4139 would reduce the suckers'
habitat by 50%.

1 impact on sucker fish populations; and 5) NMFS relied on a lack of
2 relevant information about the effects of variable flow regimes on
3 salmon and the salmon's utilization of the Klamath River. Plaintiffs
4 allege that these failures render the BiOps and their adoption by
5 Reclamation arbitrary and capricious.

6 The ESA requires the Secretary of the Interior to promulgate
7 regulations listing species of animals that are "threatened" or
8 "endangered" under certain criteria and to designate their "critical
9 habitat." 16 U.S.C. § 1533. The ESA further requires each federal
10 agency to ensure that any agency action "is not likely to jeopardize
11 the continued existence of any endangered species or threatened
12 species or result in the destruction or adverse modification of
13 [critical] habitat." Id. § 1536(a)(2). If an agency determines that
14 a proposed action could adversely affect a listed species, it must
15 engage in formal consultation with the appropriate expert agency,
16 such as FWS or NMFS. The consulting agency must then provide the
17 action agency with a BiOp explaining how the proposed action will
18 affect the species or its habitat, i.e., whether the proposed action
19 will result in "jeopardy" or "no jeopardy." Id. § 1536(b)(3)(A).

20 If the consulting agency concludes that the proposed action will
21 jeopardize the continued existence of a listed species or adversely
22 affect critical habitat, the BiOp must outline any RPAs that will
23 avoid those consequences. Id. Alternatively, if the BiOp concludes
24 that the agency action will not result in jeopardy or adversely
25 affect habitat, or proposes RPAs to avoid jeopardy, the consulting
26 agency must provide a written statement specifying the "impact of
27 such incidental taking on the species," as well as RPAs "necessary or

1 appropriate to minimize such impact." Id. § 1536(b)(4). Finally,
2 the consulting agency must describe the terms and conditions that
3 must be complied with to implement the RPAs. Id. During the
4 consultation process, the ESA forbids "irreversible or irretrievable
5 commitment of resources" which could foreclose the implementation of
6 an RPA. Id. § 1536(d).

7 Plaintiffs first argue that the purpose of the Klamath Project,
8 pursuant to the Reclamation Act, is irrigation. Plaintiffs allege
9 that the RPAs adopted by Reclamation benefit fish to the detriment of
10 irrigation, and the RPAs are therefore inconsistent with the
11 Project's purpose. Plaintiffs also allege that the RPAs contained in
12 the BiOps are not "economically feasible." These arguments are
13 without merit.

14 True, an RPA is defined as an alternative action which is
15 "consistent with the purposes of the action" and "economically and
16 technically feasible." 50 C.F.R. § 402.02. Read in context,
17 however, the RPAs must be economically and technically feasible for
18 the government to implement. Additionally, as discussed above,
19 agency actions taken pursuant to the Reclamation Act must comply with
20 the requirements of the ESA. See Tennessee Valley Authority v. Hill,
21 437 U.S. 153, 185 (1978) (ESA obligations take "priority over the
22 'primary' missions'" of federal agencies). Further, agency actions
23 are subject to the government's duty to protect tribal resources.
24 Reclamation's legal duty to operate the Project consistent with its
25 ESA and tribal trust obligations does not render the RPAs
26 inconsistent with the Project's purpose. Patterson, 204 F.3d at
27 1213-14.

1 Next, plaintiffs attempt to argue that no provision of the ESA
2 compels Reclamation to take action to release previously stored water
3 to augment the flow of the Klamath River. The government contends
4 that the RPAs do not require Reclamation to "manufacture" water, but
5 that the RPAs are conditioned upon the availability of water.
6 Defendants' Opposition to Motion for Preliminary Injunction, p. 22,
7 n.15. Regardless, the ESA requires an agency to avoid jeopardy to
8 species, "whatever the cost." TVA v. Hill, 437 U.S. at 184.
9 Plaintiffs present no support for this novel interpretation of the
10 ESA.

11 Plaintiffs also argue that FWS and NMFS failed to develop an
12 environmental baseline for the suckers and coho salmon in the BiOps.
13 Plaintiffs contend that an environmental baseline must be established
14 so as to compare "some thing or some condition" to "something else or
15 some other condition." Plaintiffs' Memorandum in Support of
16 Preliminary Injunction, p. 29-30. Plaintiffs provide no support for
17 this interpretation, and the regulatory definition of "environmental
18 baseline" refutes their argument.

19 A BiOp prepared by FWS or NMFS must "[e]valuate the effects of
20 the action and cumulative effects on the listed species or critical
21 habitat." 50 C.F.R. § 402.14(g)(3). "Effects of the action" is
22 defined as "the direct and indirect effects of an action on the
23 species or critical habitat, together with the effects of other
24 activities that are interrelated or interdependent with that action,
25 that will be added to the environmental baseline." Id. § 402.02
26 (definitions). The "environmental baseline" includes "past and
27 present impacts of all Federal, State, or private actions and other

1 human activities in the action area, the anticipated impacts of all
2 proposed Federal projects in the action area that have already
3 undergone formal . . . consultation, and the impact of State or
4 private actions which are contemporaneous with the consultation in
5 process." Id.

6 Therefore, all human activities that impact the listed species
7 must be considered in the environmental baseline. The effects of the
8 proposed action are then addressed "in conjunction with the impacts
9 that constitute the baseline." Defenders of Wildlife v. Babbitt, 130
10 F. Supp.2d 121, 127-28 (D.D.C. 2001) ("The [BiOp] must also include
11 an analysis of the effects of the action on the species when 'added
12 to' the environmental baseline--in other words, an analysis of the
13 total impact on the species."). The environmental baseline is part
14 of the entire "effects of the action" on the listed species or
15 habitat that must be considered, rather than some concrete standard
16 or condition to which other standards or conditions are compared. A
17 cursory review of the BiOps shows that FWS and NMFS considered the
18 cumulative impacts on sucker and salmon populations and their
19 respective habitats.

20 Finally, plaintiffs argue that the RPAs are not based on the best
21 scientific evidence available, and that other alternatives supported
22 by scientific evidence should be employed by Reclamation to preserve
23 water for irrigation releases.

24 Upon a finding of jeopardy, the ESA requires the Secretary of the
25 Interior to "suggest those reasonable and prudent alternatives" which
26 would not likely jeopardize the continued existence of an endangered
27 species. 16 U.S.C. § 1536(b)(3)(A). The RPAs must be based on the

1 "best scientific and commercial data available." 16 U.S.C. §
2 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

3 An agency has wide latitude to determine what is "the best
4 scientific and commercial data available." The Ninth Circuit has
5 interpreted this provision to mean an agency cannot ignore available
6 biological information. "In light of the ESA requirement that the
7 agencies use the best scientific and commercial data available to
8 insure that protected species are not jeopardized, the USFWS cannot
9 ignore available biological information." Connor v. Buford, 848 F.2d
10 1441, 1454 (9th Cir. 1988) (internal cite omitted); accord San Luis
11 & Delta-Mendota Water Authority v. Badgley, ___ F. Supp.2d ___, 2000
12 WL 33174414, 10-11* (E.D. Cal. June 28, 2000); Pacific Coast
13 Federation of Fishermen's Ass'n v. National Marine Fisheries Service,
14 71 F. Supp. 2d 1063, 1073 (W.D. Wash. 1999). Thus, it is presumed
15 that agencies have used the best data available unless those
16 challenging agency actions can identify relevant data not considered
17 by the agency. See, e.g., Friends of Endangered Species v. Jantzen,
18 760 F.2d 976, 985 (9th Cir. 1985).

19 Plaintiffs allege that NMFS and FWS selectively reported
20 information in the BiOps and ignored relevant scientific evidence.
21 See Declaration of David A. Vogel, ¶¶ 5, 7. For example, plaintiffs
22 allege that the FWS BiOp fails to recognize evidence demonstrating
23 that lower levels of UKL will not harm and may benefit the sucker
24 fish. Apparently, plaintiff Klamath Water Users Association provided
25 Reclamation with a report titled "*Protecting the Beneficial Uses of*
26 *Waters of Upper Klamath Lake: A Plan to Accelerate Recovery of the*
27 *Lost River and Shortnose Suckers.*" See Declaration of Alex J. Horne,

1 Ex. A. According to the report, increasing the depth of UKL in the
2 summer, as proposed under the 2001 Plan, could promote rather than
3 inhibit fish kills. Vogel Declaration, ¶¶ 6,7. Plaintiffs recommend
4 the technique of oxygenation or aeration, to improve water quality
5 and decrease the risk of fish kills. Horne Declaration, ¶ 4.
6 Plaintiffs further contend that FWS does not establish the necessity
7 for vegetated habitat for shortnose and Lost River sucker larval
8 survival, because the BiOp did not address evidence that larvae
9 existed at non-vegetated sites at other nearby reservoirs.
10 Declaration of Keith Marine, ¶ 12.

11 With respect to the NMFS BiOp, plaintiffs contend that it fails
12 to consider "numerous other factors" other than the flow regime at
13 Iron Gate Dam which affect coho salmon population. Vogel
14 Declaration, ¶ 9; Marine Declaration, ¶ 9. Plaintiffs maintain that
15 little, if any, scientific evidence supports the conclusion that
16 water releases from Iron Gate Dam affects the salmon. Vogel
17 Declaration, ¶¶ 9-11. Further, plaintiffs claim that the tributaries
18 of the Klamath River, rather than the mainstem, is the critical
19 habitat of the coho salmon.⁸ Vogel Declaration, ¶ 19. Plaintiffs
20 also allege that the final BiOp fails to address numerous criticisms
21 of the draft BiOp. Supplemental Declaration of David A. Vogel.

22
23 ⁸Plaintiffs complain that some of the evidence that FWS and
24 NMFS relied upon was performed without public or independent
25 scientific peer review, and that their representatives have not
26 been included in the consultation process. See, e.g., Declaration
27 of Tessa Stuedli. However, as the government correctly pointed out
28 during oral argument, the ESA does not require public review or
input during the consultation process. See 50 C.F.R. § 402.14(g).
Further, the government noted that it voluntarily made draft and
final BiOps and EAs available to plaintiffs and others through a
Web site and other sources.

1 Defendants-intervenors The Wilderness Society and the Tribes
2 present opposing views. "Plaintiffs have based their criticisms on
3 the [FWS BiOp] on incomplete or cursory analysis of the vast body of
4 data on UKL, incomplete review of existing literature and research,
5 a complete misunderstanding and oversimplification of the lake
6 elevation, water quality, and fisheries dynamics within UKL."
7 Declaration of Dr. Jacob Kann, ¶ 2. The Klamath Tribes dispute the
8 contention that the FWS BiOp is not supported by adequate scientific
9 evidence concluding that vegetated habitats are important to sucker
10 populations. Declaration of Larry Dunsmoor, ¶ 4. The Tribes also
11 dispute plaintiffs' conclusions about fish kill data, describing
12 plaintiffs' expert's approach as simplistic. Dunsmoor Declaration,
13 ¶ 12.

14 The Wilderness Society and the Yurok Tribe maintain that the
15 reduced flow in the Klamath River caused by Project Operations over
16 the last 85 years is one of the major contributing factors to the
17 decline in salmon populations. Declaration of Ronnie M. Pierce, ¶
18 17. The Wilderness Society and the Tribe criticize plaintiffs'
19 assumption that the salmon do not need adequate flow stream in the
20 mainstem Klamath River to avoid jeopardy. Pierce Declaration, ¶¶ 10,
21 17; Declaration of Michael Belchik, ¶¶ 9-17. They emphasize that
22 some evidence plaintiffs rely on is outdated and inapplicable to the
23 current conditions of the Klamath River and the 1997 listing of the
24 coho salmon. Belchik Declaration, ¶¶ 14, 18; see also, Declaration
25 of Michael Rode (attached as Ex. A. to Declaration of Jan Hasselman).

26
27 Finally, the government directs the court to the reasoning and
28 33 - OPINION AND ORDER

1 conclusions of the BiOps and evidence in the record which rebuts
2 plaintiffs' contentions. See Defendants' Opposition to Motion for
3 Preliminary Injunction, pp. 26-36. The government also points out
4 that others in the scientific community reviewed plaintiffs'
5 contentions and found them lacking. Id. p. 30; see FWS AR, Volume
6 25, D-2; D-3; D-5; D-6; D-7; D-9. Moreover, plaintiffs fail to
7 identify relevant scientific evidence that FWS or NMFS failed to
8 consider. The relevant evidence allegedly "ignored" is included in
9 the administrative record, as plaintiffs emphasize. See Supp.
10 Declaration of David A. Vogel.

11 The opposing views and supporting evidence of the parties
12 demonstrate that plaintiffs simply disagree with the scientific
13 conclusions reached by FWS and NMFS. See Plaintiffs' Reply in
14 Support of Motion for Preliminary Injunction, pp. 15-20. The fact
15 that such disagreement exists, however, does not render the BiOps
16 arbitrary and capricious. See Aluminum Co. v. Bonneville Power
17 Admin., 175 F.3d 1156, 1162 (9th Cir. 1999), cert. denied, 528 U.S.
18 1138 (2000) (NMFS' BiOp was not arbitrary and capricious where
19 differing scientific views were resolved through expert choices and
20 plans for further studies). An agency is not required to rely on
21 evidence that is conclusive or certain; rather, an agency must
22 utilize the best evidence available when preparing BiOps. Greenpeace
23 Action v. Franklin, 14 F.3d 1324, 1336-37 (9th Cir. 1992) (upholding
24 finding of no jeopardy based on admittedly "weak" evidence"); accord
25 Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 680 (D.D.C.
26 1997).

27 The FWS and NMFS BiOps explain how the RPA minimum UKL levels and

1 Klamath River flows are necessary to avoid jeopardy to suckers and
2 coho salmon and to preserve their habitat. The BiOps are supported
3 by voluminous administrative records, rendering it unlikely that they
4 have no rational basis.

5 Plaintiffs would have the court substitute plaintiffs' analysis
6 of the relevant science for that of the expert agencies. However,
7 the court cannot force Reclamation to choose one alternative over
8 another. See Southwest Center for Biological Diversity v. United
9 States Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998) (the
10 Secretary is not required to choose the best alternative or to
11 explain why one alternative was chosen over another). Absent a
12 showing that NMFS or FWS failed to consider relevant, available,
13 scientific data, plaintiffs are unlikely to prevail on this claim.

14 Regardless, even if plaintiffs could show a likelihood of success
15 on the merits of their ESA claims, they would not be entitled to the
16 injunctive relief they seek. Under the APA, the court has authority
17 to "set aside" the challenged agency action, i.e., the BiOps.⁹
18 Reclamation has recognized that ongoing operations of the Project
19 could adversely affect suckers and coho salmon and initiated
20 consultation with NMFS and FWS. Therefore, if the BiOps are set
21 aside, Reclamation must reinitiate consultation and obtain valid
22 BiOps from NMFS and FWS. During that time, ESA prohibits an agency
23

24 ⁹The government also argues that plaintiffs are not entitled
25 to injunctive relief because APA does not provide for affirmative
26 injunctive relief and that relief pursuant to the citizen suit
27 provision of ESA requires sixty days notice. 16 U.S.C. §
28 1540(g)(2)(A)(i). The court finds the sixty-day notice requirement
inapplicable here, where plaintiffs seek judicial review of their
claim pursuant to the APA.

1 from committing resources which would preclude the application of an
2 RPA:

3 After initiation of consultation required under subsection
4 (a)(2) of this section, the Federal agency . . . shall not
5 make any irreversible or irretrievable commitment of
6 resources with respect to the agency action which has the
7 effect of foreclosing the formulation or implementation of
8 any reasonable and prudent alternative measures which would
9 not violate subsection (a)(2) of this section.

10 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. Here, release of the
11 requested amounts of Project irrigation water would foreclose the
12 implementation of any RPA involving higher UKL elevations and higher
13 instream flows below Iron Gate Dam; the water would be irretrievable.
14 Moreover, if the BiOps were set aside, the requirements set forth by
15 Judge Armstrong in Pacific Coast Federation of Fishermen's
16 Associations v. Bureau of Reclamation would not be met, and in all
17 likelihood the injunction enjoining releases of irrigation water, if
18 lifted, would be reinstated. Therefore, even if plaintiffs could
19 show a likelihood of success on the merits of their ESA claims, the
20 ESA explicitly prohibits the relief they seek.

21 CONCLUSION

22 In essence, plaintiffs request that this court stand in the place
23 of Reclamation as the operator of the Project and reallocate Project
24 water in a manner that is inconsistent with governing law.
25 Plaintiffs fail to show a likelihood of success on the merits of
26 their claims, and,
27 more importantly, plaintiffs fail to establish that they are entitled
28 to the injunctive relief they seek. While the court sympathizes with
29 plaintiffs and their plight, I am bound by oath to uphold the law.
30 The law requires the protection of suckers and salmon as endangered

1 and threatened species and as tribal trust resources, even if
2 plaintiffs disagree with the manner in which the fish are protected
3 or believe that they inequitably bear the burden of such protection.

4 The scarcity of water in the Klamath River Basin is a situation
5 likely to reoccur. It is also a situation which demands effort and
6 resolve on the part of all parties to create solutions that provide
7 water for the necessary protection of fish, wildlife and tribal trust
8 resources, as well as the agricultural needs of farmers and their
9 communities. Continued litigation is not likely to assist in such a
10 challenging endeavor. This court hopes and expects that the parties
11 and other entities necessary to long-term solutions will continue to
12 pursue alternatives to meet the needs of the Klamath River Basin.

13 Plaintiffs' Motion for Preliminary Injunction (doc. # 3) is
14 DENIED.

15 IT IS SO ORDERED.

16 Dated this _____ day of April, 2001.

17
18 _____
19 Ann Aiken
20 United States District Judge
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